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In the

Supreme Court of the United States

October Term, 1993

KENT ANDREW FOLLETTE and
JANE ELIZABETH FOLLETTE,
Individually and as Next Friends of
ANDREW STEPHENSON FOLLETTE, a Minor Child,

Petitioners,

v.

CLAIROL, INC. and WAL-MART STORES, INC.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In a lawsuit filed in a Texas district court, but based on transactions and occurrences totally unrelated to that forum, the Fifth Circuit affirmed the application of the Louisiana prescriptive statute as a bar to Petitioners' personal injury claims based on a finding that it was not fair and reasonable for a Texas court to assume personal jurisdiction over the corporate defendants under the facts and circumstances of this particular case. In so holding, the Fifth Circuit rejected Petitioners' argument that compliance with the Texas registration statute represented consent to jurisdiction in all cases and a waiver of any due process challenge in a particular case.

Does the Fifth Circuit's interpretation of the scope of the Texas registration statute create an intercircuit conflict or provide any other reason for a grant of certiorari?

List of Parties, Parent Companies, and Subsidiaries

The names of all parties appear in the case caption. The parent company of Respondent Clairol, Inc. is Bristol-Myers Squibb Company. Clairol, Inc. has no subsidiaries, other than wholly owned subsidiaries. Respondent Wal-Mart Stores, Inc. has no parent company. The subsidiaries of Wal-Mart Stores, Inc. (other than wholly owned subsidiaries) are as follows:

Club Aurrera S.A. de C.V.
Commercializadora Mexico Americana S.A. de C.V.
Controladora Club Aurrera S.A. de C.V.
Immobiaiaria Capir S.A. de C.V.
Quality Leasing Corp.
Temple Beverages, Inc.
Wal-Mart Pharmacy of Michigan, Inc.

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Statutory and Constitutional Provisions

In their list of statutory and constitutional provisions, Petitioners erroneously include article 8.08 of the Texas Business Corporation Act. In their brief on appeal to the Fifth Circuit, this statutory section was neither mentioned nor discussed.

Statement of the Case

This products liability action arose from a household accident that occurred in Louisiana involving a product purchased in Louisiana by Petitioners, who are Louisiana residents. Petitioners sued Clairol and Wal-Mart in federal court in Texas. As the court below specifically found, the cause of action "had absolutely no relationship or connection with the State of Texas" except that the plaintiffs filed suit there.[1] Petitioners concede that if they had filed suit in Louisiana, where their claims arose, the claims would have been prescribed by Louisiana's one-year prescriptive statute.[2]

Clairol is a Delaware corporation with its principal place of business in New York; Wal-Mart is a Delaware corporation with its principal place of business in Arkansas. In the Texas court, both corporations filed motions to dismiss for lack of personal jurisdiction, or in the alternative, to transfer the case under 28 U.S.C. § 1406(a).

Unlike some states, Texas has no statute providing that Texas courts have general personal jurisdiction over all corporations that have qualified to do business in Texas or have registered an agent there for service of process. Similarly, no Texas statute provides that qualification to do business or registration of an agent represents consent by the corporation to personal jurisdiction in any lawsuit.

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[1] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 3a.

[2] Petition for a Writ of Certiorari, at 7. The record below contains no support for Petitioners' explanation to this Court of why they delayed in filing suit until after Louisiana's prescriptive statute had run. *See id.*

The federal district judge in Texas nevertheless decided that merely by qualifying to do business in Texas, Clairol and Wal-Mart had "consented" to general personal jurisdiction in all Texas courts in all lawsuits.[3] On that basis alone, the Texas court concluded that it had general personal jurisdiction over the two corporations. Despite that conclusion, the Texas judge transferred the case to a Louisiana federal court under 28 U.S.C. § 1404(a).

Soon after the transfer, the Fifth Circuit handed down its decision in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047, 122 L. Ed. 2d 356 (1993). In *Siemer*, the Fifth Circuit held that the mere act of qualifying to do business in Texas does not automatically subject a defendant to the general personal jurisdiction of all Texas courts in all lawsuits. Instead, "a foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible."[4]

The *Siemer* court explained that the mere appointment of an agent for service of process does not automatically confer general personal jurisdiction over the corporation in all lawsuits, even those with no relationship to the forum. The appointment of an agent, said the court, does not amount to a waiver of a corporation's due process protection. Instead, a federal court must still conduct the traditional due process analysis required by *Perkins v. Benguet Consolidated Mining Co.*[5] – including the two-part assessment of minimum contacts and fairness.

In the Louisiana federal court, Clairol and Wal-Mart filed motions for summary judgment based on the application of

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[3] Order of the U.S. District Court for the Eastern District of Texas, Appendix F to the Petition for a Writ of Certiorari, at 20a-23a. The order in Appendix F concerns only Clairol's motion to dismiss. The Texas district court issued a similar order concerning Wal-Mart's motion to dismiss, which is included as Appendix A to this brief.

[4] *Siemer*, 966 F.2d at 183.

[5] 342 U.S. 437, 445-48 (1952).

Louisiana's one-year prescriptive statute. Directly applying the holding of *Siemer*, the Louisiana district court determined that the Texas district court had erroneously found general personal jurisdiction based solely on the corporations' compliance with the Texas registration statute.[6] The Louisiana federal court then conducted the traditional due process analysis required by the Fifth Circuit in *Siemer* and explained by this Court in *Asahi Metal Industry Co. v. Superior Court*[7] and *Perkins*,[8] among other cases.[9] The Louisiana court concluded that even if there were sufficient minimum contacts, the exercise of personal jurisdiction by the Texas court was not fair and reasonable under the facts and circumstances of this case.[10]

Contrary to Petitioners' characterization of the court's holding, the Louisiana federal court did not expansively hold that the Due Process Clause would be violated if a state ever exercised personal jurisdiction over a foreign corporation for a claim unrelated to the corporation's activities in the state.[11] Similarly, the court did not "draw the line," for all states and all cases, that general personal jurisdiction is limited to the state of incorporation and the state where the principal place of business is located.[12] Instead, the Louisiana federal court

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[6] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 5a-7a. The Louisiana district court specifically adopted the reasoning of the Report and Recommendation. *See* Judgment of the U.S. District Court for the Western District of Louisiana, Appendix E to the Petition for a Writ of Certiorari, at 18a-19a. The district court's opinion, which includes the Report and Recommendation, is now published: *Follette v. Clairol, Inc.*, 829 F. Supp. 840 (W.D. La.), *aff'd*, 998 F.2d 1014 (5th Cir. 1993) (table entry).

[7] 480 U.S. 102 (1987).

[8] 342 U.S. 437 (1952).

[9] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 7a-15a.

[10] *Id.* at 14a-15a.

[11] *See* Petition for a Writ of Certiorari, at 9-10.

[12] *Id.* at 10.

issued a very narrow holding, based solely on its application of the two-part due process analysis to the circumstances of this case:

> The court finds that plaintiffs have established that there is at least a genuine issue as to whether defendants have the necessary minimum contacts with the State of Texas. This requires the court to address the issue of whether the exercise of general jurisdiction is fair and reasonable under the circumstances of this case.
>
> There are persuasive arguments that the states with power to exercise general personal jurisdiction over a corporation should be limited to the state of incorporation and the state where the corporation's principal place of business is located. This court agrees that this is the "fair" and "reasonable" place to draw the line on permissible exercise of general personal jurisdiction under the circumstances presented in *this* case.[13]

The Louisiana federal court concluded that since the Texas federal court did not have personal jurisdiction over the two corporations, the Texas statute of limitations did not apply.[14] Instead, the Louisiana one-year prescriptive statute barred Petitioners' claims as a matter of law.[15] The Louisiana federal court thus granted summary judgment for the corporations.[16]

Petitioners appealed this decision to the Fifth Circuit. In their appeal, they did not contend that under the due process analysis set forth in *Perkins* and *Asahi*, the Louisiana federal

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[13] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 11a (emphasis in original) (citations omitted).

[14] *Id.* at 4a, 15a (citing *Ferens v. John Deere Co.*, 494 U.S. 516 (1990)).

[15] *Id.* at 15a.

[16] *Id.*; Judgment of the U.S. District Court for the Western District of Louisiana, Appendix E to the Petition for a Writ of Certiorari, at 18a-19a.

court had wrongly determined that it was not fair and reasonable to subject the corporations to general personal jurisdiction in Texas. Instead, Petitioners argued only that the court had erred in concluding that such an analysis was required. Despite the Fifth Circuit's recent holding to the contrary in *Siemer*, Petitioners contended in their brief that the Texas registration statute provides broad consent to personal jurisdiction in all lawsuits filed in Texas, without resort to any due process analysis.

In an unpublished opinion, the Fifth Circuit adopted the reasoning of the Report and Recommendation of Magistrate Judge Wilson, which had also served as the basis for the district court's decision.[17] Opinions that are not published by the Fifth Circuit are those that "have no precedential value and merely decide particular cases on the basis of well-settled principles of law."[18]

Reasons for Denying the Writ

In the Report and Recommendation, on which both lower courts based their decisions, the magistrate judge concluded that under *Siemer*: (1) the Texas registration statute did not provide for "automatic consent" or waiver of any due process challenge to jurisdiction by all foreign corporations; and (2) a traditional due process inquiry was necessary in each case. The magistrate judge then applied the due process analysis required by *International Shoe*, *Perkins*, and *Asahi* to the specific facts of this case.

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[17] *See Follette v. Clairol, Inc.*, No. 93-4347 (unpublished opinion of the Fifth Circuit), Appendix A to the Petition for a Writ of Certiorari, at 1a-2a (table entry at 998 F.2d 1014 (5th Cir. 1993)); Judgment of the U.S. District Court for the Western District of Louisiana, Appendix E to the Petition for a Writ of Certiorari, at 18a-19a.

[18] Local Rule of the Fifth Circuit 47.5.1 (28 U.S.C. Rules, Fifth Circuit); *see Follette v. Clairol, Inc.*, No. 93-4347 (unpublished opinion of the Fifth Circuit), Appendix A to the Petition for a Writ of Certiorari, at 1a (quoting the Local Rule).

Based on that analysis, the magistrate judge concluded that even if minimum contacts existed, the maintenance of the suit in Texas would not be fair and reasonable – that is, would offend "traditional notions of fair play and substantial justice."[19] As this Court has explained, this determination depends "on the particular facts of each case."[20] Such fact-based decisions are not appropriate for certiorari consideration in the absence of "a marked departure by a lower court in the application of established law."[21]

In this case, the initial factual determination by the magistrate judge has already been reviewed by two separate courts – the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit. This factual finding is entitled to deference because this Court accords "great weight to a finding of fact which has been made by a district court and approved by a court of appeals."[22] Moreover, in the Fifth Circuit, Petitioners did not challenge this finding of fact. Instead, they argued merely that the trial court should not have conducted a due process analysis but should have instead presumed that jurisdiction in Texas was proper based solely on "consent" to jurisdiction under the Texas registration statute.

In the Fifth Circuit and in this Court, Petitioners mischaracterize the Texas registration statute as a broad contract between the state and all foreign corporations that comply with it. They argue that merely by obeying the Texas registration statute, corporations automatically consent to personal jurisdiction over them in any lawsuit, filed in any Texas court, by any plaintiff – even if the lawsuit arises outside Texas and

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[19] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[20] *General Council of the United Methodist Church v. Superior Court*, 439 U.S. 1369, 1373 (1978); *see Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

[21] *General Council of the United Methodist Church*, 439 U.S. at 1373-74.

[22] *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984); *see Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

has no relationship to the state.[23] In this case, the Fifth Circuit Court of Appeals unanimously rejected that statutory interpretation, noting that it directly conflicted with its recent decision in *Siemer v. Learjet Acquisition Corp.*,[24] a similar case involving the same Texas statute. This Court recently denied the petition for writ of certiorari in *Siemer*.[25]

In *Siemer*, the plaintiffs had asserted the identical "automatic consent to jurisdiction" argument as that asserted by Petitioners in this case. In *Siemer*, the Fifth Circuit rejected that argument because:

(1) It was not supported by the language of the Texas statutes on which the plaintiffs relied.

(2) It was inconsistent with the due process analysis set forth by this Court in *Hall*, which holds that before subjecting a corporation to claims arising outside the forum, the court must assess not only whether the corporation has substantial contacts with the forum, but also whether the exercise of jurisdiction is fair and reasonable under the circumstances.

(3) It ignored the five factors enunciated by this Court in *Asahi* – factors a court should consider in determining whether the exercise of jurisdiction is fair and reasonable under the circumstances of the case.

The Fifth Circuit in this case merely applied the holding of *Siemer*. As in *Siemer*, there is no reason and no need for this Court to review the Fifth Circuit's decision. The result

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[23] In their brief to the Fifth Circuit, Petitioners argued that the Texas Business Corporation Act "gives *consent* to the jurisdiction of Texas courts for any cause of action, whether or not arising out of activities within the state. Such consent is, as it always has been, a valid basis of personal jurisdiction, and resort to any type of 'minimum contacts' or 'sustained and systematic contacts' analysis to justify jurisdiction is unnecessary."

[24] 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047, 122 L. Ed. 2d 356 (1993).

[25] *Id.*

reached in this case is consistent with the express language of a particular state statute; the trial and appellate courts below reached a fact-specific conclusion after applying the current due process standards for personal jurisdiction.[26]

I. The Texas statute on which Petitioners rely is contrary to their position.

The actual language of the Texas Business Corporation Act undercuts Petitioners' premise that foreign corporations, merely by complying with the Act's registration requirements, waive their right to due process protection and grant their consent to be sued in Texas for any and all causes of action arising anywhere in the world. Although some state statutes do contain such a broad waiver based on consent to jurisdiction, the Texas statute specifically limits the duties, restrictions, penalties, and liabilities that can be imposed on a foreign corporation:

> A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked . . . , enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, *as to all matters affecting the transaction of intrastate business in this State*, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation.[27]

The Texas statute, itself, does not purport to subject foreign corporations to the same burdens as domestic corporations as to all matters – but only "as to all matters affecting

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[26] *See General Council of the United Methodist Church*, 439 U.S. at 1373; *Kulko*, 436 U.S. at 92.

[27] Tex. Bus. Corp. Act Ann. art. 8.02 (Vernon Supp. 1994) (emphasis added).

the transaction of *intrastate business*."[28] The matter in this case does not affect or involve intrastate business in Texas; instead, it arises out of an accident in Louisiana involving Louisiana residents and a product purchased in Louisiana.

While the magistrate judge did not specifically discuss the language of the Texas registration statute, the court – based on *Siemer* – rejected Petitioners' "automatic consent to jurisdiction" or "due process waiver" argument. The *Siemer* court specifically considered, and rejected, the contention that the Texas statute grants Texas courts personal jurisdiction in any and all cases, even those arising outside the state:

> The Texas Business Corporation Act provides that service on a registered foreign corporation may be affected by serving its president, any vice president, or the registered agent of the corporation. . . .
>
> The Eighth Circuit, construing an Arkansas registration statute even less explicit as to its limited scope, found that the statute could be read, "at its broadest, to cover only causes of action arising out of . . . transactions in Arkansas." *Pearrow v. National Life & Accident Insurance Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (citations omitted). In the First Circuit, it was noted that any other construction of the Maine registration statute would be unreasonable. *Sandstrom v. ChemLawn Corp.*, 727 F. Supp. 676, 681 (D. Me. 1989), *aff'd*, 904 F.2d 83, 88-89 (1st Cir. 1990).[29]

Like the *Pearrow* court and the *Sandstrom* court, the *Siemer* court concluded that the statute at issue, at its broadest, covered only claims arising from intrastate transactions.

In *Pearrow*,[30] the Eighth Circuit considered an Arkansas registration statute similar to the Texas statute.[31] Like the

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[28] *Id.* (emphasis added).

[29] *Siemer*, 966 F.2d at 183.

[30] 703 F.2d 1067 (8th Cir. 1983).

[31] *Siemer*, 966 F.2d at 183.

Texas statute, the Arkansas statute subjected foreign insurers to process for any obligations or liabilities resulting from their transactions within the state.[32] The plaintiff argued that by registering an agent within the state, the corporation had consented to the general jurisdiction of the state's courts.[33]

The Eighth Circuit rejected that argument without ever reaching the constitutional question of whether consent to jurisdiction, expressly or impliedly granted in a broad registration statute, would provide an adequate constitutional basis for general personal jurisdiction. The court explained: "To the extent that [the registration statute] can be read as jurisdictional rather than as a method of serving process, it does not apply to this case. That section can be read, at its broadest, to cover only causes of action arising out of the insurance business or other transactions in Arkansas."[34]

Like the courts in *Siemer*, *Pearrow*, and *Sandstrom*, the court in this case conducted a traditional due process analysis because the specific state statute, as construed by the federal court, did not contain any express consent to jurisdiction and did not require an advance waiver of any due process challenge to jurisdiction.

II. This decision is consistent with decisions in other circuits on the effect of registration statutes in the analysis of personal jurisdiction.

Petitioners argue that the decision in this case conflicts with two decisions – *Bane v. Netlink, Inc.*,[35] from the Third Circuit, and *Knowlton v. Allied Van Lines*,[36] from the Eighth Circuit. *Bane* and *Knowlton*, however, fall into an entirely different category from the decisions in *Pearrow*, *Sandstrom*, *Siemer*, and the current case. The distinguishing factor in

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[32] *Pearrow*, 703 at 1069 & n.3.

[33] *Id.* at 1068-69.

[34] *Id.* at 1069 (citations omitted).

[35] 925 F.2d 637 (3d Cir. 1991).

[36] 900 F.2d 1196 (8th Cir. 1990).

cases such as *Bane* and *Knowlton* is that the courts construed the state statutes to contain an express consent to jurisdiction and a waiver of a due process challenge in any case.

In both *Bane* and *Knowlton*, the courts construed state statutes that were significantly broader than the Texas statute and the statutes considered in *Pearrow* and *Sandstrom*. Unlike the Texas statute, which is specifically limited to "matters affecting the transaction of intrastate business in this State,"[37] the statutes considered in *Bane* and *Knowlton* contain no such limitations. The *Bane* and *Knowlton* courts therefore considered the constitutional question of whether, under a broad state registration statute, a corporation's advance consent to jurisdiction and advance waiver of any due process challenge were constitutional.

A. *Bane* creates no conflict with this case because the *Bane* court construed a state statute that expressly requires corporate consent to general personal jurisdiction.

In *Bane v. Netlink, Inc.*, the Third Circuit case that allegedly creates a conflict, the court considered whether Mr. Bane, who had worked for Netlink both in Pennsylvania and in Massachusetts, could sue Netlink in Pennsylvania for age discrimination.[38] Netlink was a Delaware corporation with its principal place of business in North Carolina.[39] Based on a traditional due process analysis of minimum contacts and fairness, the Pennsylvania federal district court held that it lacked general personal jurisdiction over Netlink.[40] The Third Circuit disagreed, noting that the trial court had failed to

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[37] Tex. Bus. Corp. Act art. 8.02 (Vernon Supp. 1994). Petitioners incorrectly suggest that the Texas statute is not limited to intrastate activities. Petition for a Writ of Certiorari, at 11 n.8.

[38] 925 F.2d 637, 638-39 (3d Cir. 1991).

[39] *Id.* at 638.

[40] *Id.* at 639-40.

consider the effect of Netlink's qualifying to do business in Pennsylvania.[41]

Without deciding whether this additional contact would, under a traditional due process analysis, change the trial court's result on the issue of general personal jurisdiction, the Third Circuit concluded that based on a Pennsylvania jurisdictional statute, Netlink had actually consented to general personal jurisdiction.[42] This conclusion was reasonable, in light of the statute's express language on the issue of general personal jurisdiction:

> The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise *general personal jurisdiction* over such person . . . :
>
> (2) Corporations –
>
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.[43]

The Pennsylvania statute thus gave Netlink actual notice that a Pennsylvania court could exercise general personal jurisdiction over it based solely on the act of qualifying to do business in the state. In light of this statute, the Third Circuit concluded that Netlink had actually consented to general personal jurisdiction in any case filed within the state and had therefore waived any right to have a court consider the issue of due process.

Unlike the statute in *Bane*, the Texas statutes relied on by Petitioners give a foreign corporation no indication that general personal jurisdiction can be based merely on the act of qualifying to do business or registering an agent for service of process. In contrast to the Pennsylvania statute, the Texas

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[41] *Id.* at 640.

[42] *Id.*

[43] *Id.* (quoting 42 Pa. Cons. Stat. Ann. § 5301 (1990)) (emphasis added).

statutes do not even mention personal jurisdiction. Because of the limited nature of the Texas statutes, the courts in this case faced an entirely different question from the question considered in *Bane*.

B. *Knowlton* creates no conflict with this case because the *Knowlton* court construed an unlimited state statute as a broad grant of corporate consent to jurisdiction.

In *Knowlton v. Allied Van Lines*, Ms. Knowlton, a Minnesota resident, was driving through Iowa when an Allied moving van collided with her car.[44] Allied was a Delaware corporation with its principal place of business in Illinois.[45] Ms. Knowlton sued Allied in Minnesota.[46] The Minnesota federal district court found that it lacked jurisdiction over Allied under the Minnesota long-arm statute.[47]

The Eighth Circuit agreed that specific personal jurisdiction did not exist under the long-arm statute, because the tort did not arise from any conduct by Allied within the state.[48] But the Eighth Circuit concluded that the court had general personal jurisdiction based on the corporation's consent to jurisdiction under the broad Minnesota registration statute.[49]

The Minnesota statute required foreign corporations transacting business within the state to appoint an agent for service of process.[50] The statute also provided that a foreign corporation that complies with the statute "shall be subject to the laws of this state."[51] The *Knowlton* court recognized that a

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[44] 900 F.2d 1196, 1197 (8th Cir. 1990).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1199.

[49] *Id.*

[50] *Id.* at 1198 n.1.

[51] *Id.*

statute "can be limited to claims arising out of in-state activities, and some statutes are so limited, but the Minnesota law contains no such limitation."[52] In contrast, the Texas Business Corporation Act, despite Petitioners' statement to the contrary,[53] is specifically limited to matters arising from the transaction of intrastate business.[54]

Adhering to the statutory construction of earlier cases in Minnesota federal courts and in the Minnesota Supreme Court, the court in *Knowlton* construed the unlimited Minnesota statute as a specific grant of corporate consent to personal jurisdiction in any case filed within the state and as a waiver of any due process challenge in a particular case. The *Knowlton* court considered a significantly broader state statute than the Texas statute and reached a different result from the Fifth Circuit. Such a difference, however, does not create a direct or irreconcilable intercircuit conflict on a significant federal issue.

C. The decision in this case is consistent with the decisions of other circuits that have considered analogous statutes.

The decision in this case corresponds to decisions from other circuits, including the Eighth Circuit, that have construed limited state registration statutes to contain no consent to jurisdiction and no waiver of due process protection. *See, e.g., Pittock v. Otis Elevator Co.*, 8 F.3d 325, 328 (6th Cir. 1993) (explaining that "the mere designation of an agent in compliance with the service-of-process statute does not automatically eliminate the requirement of minimum contacts to establish personal jurisdiction"); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 88-89 (1st Cir. 1990) (finding that a company's appointment of an agent for service of process in Maine did not automatically subject the company to general

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[52] *Id.* at 1199.

[53] *See* Petition for a Writ of Certiorari, at 11 n.8.

[54] Tex. Bus. Corp. Act Ann. art. 8.02 (Vernon Supp. 1994); *see supra* note 27 and accompanying text.

personal jurisdiction for a claim arising in Connecticut; instead, the traditional two-part due process analysis must still be undertaken); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (holding that an Arkansas registration statute limited in its scope could be read, "at its broadest, to cover only causes of action arising out of . . . transactions in Arkansas"); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 746, 748 (4th Cir.) (holding that whether general personal jurisdiction exists depends on concepts of fairness and convenience, and not merely on procedural compliance with state domestication statutes), *cert. denied*, 404 U.S. 948 (1971).

Based on their interpretation of limited state statutes, the courts in these cases concluded that the traditional due process analysis was necessary. In each of these cases, the federal court applied that analysis to the facts and circumstances of the case. The federal magistrate and the two federal courts below conducted the same analysis in this case.

These cases are distinguishable from *Bane* and *Knowlton*, which interpreted unlimited state statutes as a broad consent by foreign corporations to personal jurisdiction. Unlike *Bane* and *Knowlton*, the present case can be disposed of based solely on the limited scope of the Texas Business Corporation Act, which specifically restricts a foreign corporation's duties and liabilities to matters affecting the transaction of intrastate business.

This case does not present the constitutional question of whether mere registration to do business, under an unlimited state statute, would provide a sufficient basis for general personal jurisdiction in all cases, without any due process analysis. Consideration of that question by this Court, if merited, should await a case in which the question is raised directly – as when a federal court has construed an unlimited state statute, like the statute in *Bane*, as an advance consent to jurisdiction and an advance waiver of any due process challenge, but has then declared the statute unconstitutional and sustained the corporation's due process challenge to personal jurisdiction.

III. This decision is consistent with this Court's analysis in recent general jurisdiction cases.

Petitioners also argue that the decision in this case conflicts with "an applicable decision of this Court."[55] But the alleged "applicable decision," *Neirbo Co. v. Bethlehem Shipbuilding Co.*,[56] dates from 1939 – before this Court decided *International Shoe Co. v. Washington* in 1945.[57] In *International Shoe*, this Court began to redefine the constitutional limitations of state court jurisdiction and personal jurisdiction.[58] The more realistic jurisdictional standards of *International Shoe* and its progeny replaced the earlier fictional theories of consent and presence, on which *Neirbo* and earlier cases were based.[59]

The Fifth Circuit's rejection of Petitioners' position is consistent with this Court's leading cases on general jurisdiction.[60] In his comprehensive sixteen-page Report and Recommendation, which was adopted by the Louisiana district court and by the Fifth Circuit, Magistrate Judge Wilson specifically discussed *Hall* and *Perkins* in detail, applying the principles of each case to the facts and circumstances of the present case.[61]

The magistrate judge recognized that under applicable case law, even if the required minimum contacts exist, a federal court must still determine whether the exercise of general personal jurisdiction is fair and reasonable under all

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[55] Petition for a Writ of Certiorari, at 15.

[56] 308 U.S. 165 (1939).

[57] 326 U.S. 310 (1945).

[58] 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067, at 248-49 (2d ed. 1987) (discussing *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)).

[59] *Id.* §§ 1066-1067.

[60] *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

[61] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 7a-9a.

the circumstances.[62] Based on the circumstances of this case, the magistrate judge assessed the five factors set forth in *Asahi* for determining whether the exercise of general jurisdiction is fair and reasonable.[63] The Report and Recommendation contains a detailed analysis of each of the following factors in the context of this case:

(1) the burden on the defendant;

(2) the interests of the forum state in adjudicating the dispute;

(3) the plaintiff's interest in obtaining convenient and effective relief;

(4) the judicial system's interest in obtaining the most efficient resolution of controversies; and

(5) the shared interests of the several states in furthering fundamental substantive social policies.[64]

Both the district court and the Fifth Circuit Court of Appeals specifically adopted the reasons in the Report and Recommendation. In light of the thoughtful and painstaking analysis in that report, which faithfully applies this Court's teachings in recent jurisdictional cases, the alleged conflict between this decision and a 1939 Supreme Court case provides no basis for granting a writ of certiorari.

IV. This decision does not involve federalism, state sovereignty, or the constitutionality of any Texas statute.

In the final section of their brief, Petitioners sweepingly allege that the district court and the Fifth Circuit have inappropriately considered federalism, have impinged on state sovereignty, and have struck down a Texas statute as unconstitutional. These allegations are false.

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[62] *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

[63] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 10a-13a.

[64] *Asahi*, 480 U.S. at 113; *Burger King*, 471 U.S. at 476-77.

To support their argument on federalism, Petitioners seize on one paragraph from the Report and Recommendation that compares the forum's interests in the dispute with the interests of the other states.[65] That paragraph, however, is merely a straightforward discussion of two of the specific factors set forth in *Asahi* for determining whether the exercise of jurisdiction is fair and reasonable under the circumstances: (1) the interests of the forum state in adjudicating the dispute; and (2) the shared interests of the several states in furthering fundamental substantive social policies.[66] The plain language of the Report and Recommendation reveals that the considerations criticized by Petitioners flow directly from a faithful application of the *Asahi* factors to the circumstances of this case.

Contrary to Petitioners' assertion that the Court of Appeals found the Texas Business Corporation Act unconstitutional, no court even considered the constitutionality of this statute or any other statute in this case. Such consideration was unnecessary because the statute does not purport to grant Texas courts general jurisdiction over any foreign corporation that has complied with the Texas registration statute. To the contrary, one section of the statute actually limits the duties and liabilities of such corporations to only those matters that affect intrastate business.[67]

The Court of Appeals in this case merely applied the holding of *Siemer*, which had construed the Texas statute to apply only to intrastate transactions. The federal court did not purport to dictate how the statute must be construed by the Texas Supreme Court – which has never considered the statute in the context of personal jurisdiction. The most pertinent authority on the issue from the Texas Supreme Court, *Guardian Royal Exchange Assurance, Ltd. v. English China Clays,*

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[65] Petition for a Writ of Certiorari, at 18.

[66] *Asahi*, 480 U.S. at 113; *see Burger King*, 471 U.S. at 477.

[67] Tex. Bus. Corp. Act Ann. art. 8.02 (Vernon Supp. 1994); *see supra* note 27 and accompanying text.

P.L.C.,[68] comprehensively discusses both specific and general jurisdiction over foreign corporations,[69] clarifies the standard "to ensure compliance with federal constitutional requirements of due process,"[70] but never even hints that the standard might be inapplicable if a corporation has complied with the Texas registration statute.

In *Guardian Royal*, there is no mention of whether the foreign corporation had actually registered to do business in Texas. But in a case that is otherwise similar to the present one, the Texas Supreme Court held that although the corporation had conducted substantial business in Texas and had purposefully established minimum contacts, the assertion of personal jurisdiction, under the facts and circumstances of the case, was unreasonable and did not "comport with fair play and substantial justice."[71]

Moreover, the language of the Texas Supreme Court in *Guardian Royal* suggests that it would agree with the Fifth Circuit's construction of the Texas statute. The *Guardian Royal* court explained that when a Texas court considers personal jurisdiction, "the facts must be carefully weighed and mechanical application of any test . . . must be avoided. In addition, Texas courts should strive to utilize a realistic approach when applying the jurisdictional formula."[72]

The federal courts below applied federal law to determine whether a federal court in Texas had personal jurisdiction over the two defendants in this lawsuit. In so doing, they made no sweeping pronouncements about federalism, state sovereignty, or the constitutionality of Texas law. Despite Petitioners' attempts to characterize this decision as far-

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[68] 815 S.W.2d 223 (Tex. 1991).

[69] *Id.* at 227-33.

[70] *Id.* at 230.

[71] *Id.* at 232-33 (discussing the five fairness factors and citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

[72] *Id.* at 231.

reaching, its straightforward application of federal due process standards is important only to those who are parties to this lawsuit.

CONCLUSION

The unpublished opinion of the Fifth Circuit Court of Appeals applies well-settled due process principles to the specific facts and circumstances of this case. This decision does not conflict with any decision of this Court, does not create a direct conflict with the decisions of other Circuit Courts of Appeals, and does not meet any of the other criteria for certiorari review by this Court. Accordingly, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIEND AND COTUDORS OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD	*	
V.	*	NO. 2:91-CV-0109
CLAIROL, INC., AND WAL-MART STORES, INC., D/B/A/ SAM'S WHOLESALE CLUB AND/OR SAM'S WHOLESALE CLUB A DIVISION OF WAL-MART STORES, INC.	*	

ORDER

CAME ON TO BE HEARD THIS DAY Defendant Wal-mart Stores, Inc.'s, Motion for Dismissal or, in the alternative, Motion to Transfer for Lack of Personal Jurisdiction in the above entitled and numbered cause of action. The Court, after considering the motion and all responses thereto, finds that the motion is not well taken.

This is a product liability cause of action. Jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332(a). The plaintiffs allege that Andrew Stephenson Follette, an eleven year old child at the time of the incident, received severe and disfiguring burns over 80% of his body when an allegedly defective one gallon storage container of Clairol "Final Net" liquid spray exploded in the Follettes' home. The accident

occurred in the State of Louisiana. (Clairol's Motion to Dismiss at page 3). Andrew Stephenson Follette and his parents live in Louisiana. *Id.* The product, which allegedly caused the injuries, was sold and distributed in Louisiana by Sam's Wholesale Club a division of Walmart Stores, Inc. *Id.* The plaintiffs filed their lawsuit in the Eastern District of Texas Marshall Division against Clairol, Inc., and Walmart Stores, Inc., d/b/a Sam's Wholesale Club, a division of Walmart Stores, Inc. (Plaintiffs' Original Complaint). Both Clairol, Inc., and Walmart Stores, Inc., are qualified to do business in Texas. (Declaration in Support of Plaintiffs' Response to Clairol's Motion to Dismiss).

The question before this Court is whether Walmart Stores, Inc., is subject to personal jurisdiction in the State of Texas. This Court finds that Walmart Stores, Inc., has consented to the general jurisdiction of the Texas Courts, both state and federal, by virtue of its voluntary application for a certificate of authority to conduct business in the state.

On October 29, 1974, Walmart Stores, Inc., was issued a certificate of authority to do business in Texas by the Secretary of State. (Declaration in Support of Plaintiffs' Response to Clairol, Inc.'s, Motion to Dismiss). On October 19, 1983, Walmart Stores, Inc., registered Sam's Wholesale Club as an assumed name of Walmart Stores, Inc. *Id.* Article 8.02, *Powers of Foreign Corporation,* of the Texas Business Corporation Act states in pertinent part:

> "A. A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked in accordance with the provisions of this Act or until a certificate of withdrawal shall have been issued by the Secretary of State as provided in this Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, as to all matters affecting the transaction of intrastate business in this State, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or

> hereafter imposed upon a domestic corporation of like character and its officers and directors;"

Tex. Bus. Corp. Act Art. 8.02 (Vernon Supp. 1991).

Once a foreign corporation applies for and receives a certificate of authority to transact business in the State of Texas, it is entitled to a vast array of powers and privileges. Specifically, Article 2.02, *General Powers,* of the Texas Business Corporation Act states in part:

> "A. Subject to the provisions of Sections B and C of this Article, each corporation shall have power:
>
> . . .
>
> (2) To sue and be sued, complain and defend, in its corporate name."

Tex. Bus. Corp. Act Art. 2.02 (Vernon Supp. 1991).

Furthermore, Article 8.10, *Service of Process on Foreign Corporation,* under the Act states as follows:

> "A. The president and all vice presidents of a foreign corporation authorized to transact business in this State and the registered agent so appointed by a foreign corporation shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served."

Tex. Bus. Corp. Act Art. 8.10 (Vernon Supp. 1991). The Texas State Courts and the Courts of the Fifth Circuit have consistently held that by virtue of the theory of consent to jurisdiction implicit in the Texas Business Corporation Act under Article 8.10, a foreign corporation consents to amenability to jurisdiction for the purposes of all lawsuits brought within the state, whether or not the cause of action relates to activities within the state. *Goldman v. Prefab Transit Co.,* 520 S.W.2d 597, 598 (Tex.Civ.App. – Houston [14th Dist.] 1975, no writ). *Prejean v. Sonatrach, Inc.,* 652 F.2d 1260, 1270 n.21 (5th Cir. 1981).

The rationale behind the theory of consent is that in return for the privilege of doing business in the state, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdiction for the purpose of all lawsuits within the state.

Goldman, 520 S.W.2d at 598. Since Walmart Stores, Inc., applied for and was issued a certificate of authority to conduct business in the State of Texas, and that authority has never been withdrawn or revoked, this Court finds that Walmart Stores, Inc., has consented to the general jurisdiction of the Texas Courts, both state and federal.

However, since the plaintiffs live in Louisiana, the product was sold in Louisiana, the accident occurred in Louisiana, and all witnesses and evidence are located in that state, this Court will transfer the action for the convenience of the parties and witnesses, in the interest of justice, to the Lincoln Parish, Western District of Louisiana, Shreveport Division, under Title 28 U.S.C. § 1404(a).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant Walmart Stores, Inc.'s, Motion to Dismiss for Lack of Personal Jurisdiction is hereby in all things DENIED.

IT IS FURTHER ORDERED that the Defendant Walmart Stores, Inc.'s, Motion to Transfer for Lack of Personal Jurisdiction based on Title 28 U.S.C. § 1406, *Cure or Waiver of Defects,* is hereby in all things DENIED.

IT IS FURTHER ORDERED that for the convenience of parties and witnesses, in the interest of justice, the above case SHALL be TRANSFERRED to the Lincoln Parish, Western District of Louisiana, Shreveport Division, pursuant to Title 28 U.S.C. § 1404(a).

SIGNED THIS 23rd DAY OF APRIL, 1992.

/s/ Sam B. Hall, Jr.
JUDGE SAM B. HALL, JR., PRESIDING

Mld APR 24, 1992 to:
Perry
Rasmussen
Balch
Johnson
Finn
Grajczyk